Supreme Court, U.S.
FILED
AUG 31 1992
OFFICE OF THE CLERK

No. 92-9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GENERAL MOTORS ACCEPTANCE CORPORATION,
Petitioner,

v.

GEORGE H. MITCHELL and CAROL J. MITCHELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION AND SUPPLEMENTAL BRIEF IN OPPOSITION

TO MOTION FOR LEAVE TO FILE AND BRIEF
OF AMERICAN FINANCIAL SERVICES ASSOCIATION
AND CONSUMER BANKERS ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF PETITIONER

JAMES J. GOLD
Counsel of Record
NORMA L. HAMMES
GOLD and HAMMES
Suite 223
1570 The Alameda
San Jose CA 95126
(408) 297-8750
Attorneys for Respondents

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

George H. Mitchell and Carol J. Mitchell, Respondents, respectfully oppose this Court's granting leave to the American Financial Services Association ("AFSA") and the Consumer Bankers Association ("CBA") to file their Amici Curiae Brief in support of General Motors Acceptance Corporation's ("GMAC") Petition for Writ of Certiorari.

As noted in AFSA and CBA's Motion, the Respondents refused to consent to the filing of an Amici Curiae Brief by AFSA and CBA. Pursuant to Rule 37.2, a motion for leave to file a brief *amicus curiae* when consent has been refused is not favored.

Respondents note that the Petitioner is one of the largest members of the American Financial Services Association. The interests of AFSA and CBA in the outcome of this case are identical to GMAC's. Neither AFSA nor CBA offer a different perspective on the effects of this Court's decision.

Respondents believe that the Petitioner, a very large corporation, is financially able to retain the best legal counsel in the country. Respondents believe GMAC has such competent counsel and is in no need of additional legal assistance.

To allow the filing of *amicus curiae* briefs such as the one submitted by AFSA and CBA only further burdens the Respondents' counsel. In contrast to GMAC's counsel, the Mitchells' counsel are a two-attorney, husband-and-wife law partnership. Appeals briefs are written at night after three children are put to bed.

Respondents' attorneys are fully capable of briefing

this case — however, they would appreciate responding to just one competent brief filed by GMAC (perhaps with suggestions or assistance by AFSA and CBA), rather than two or more uncoordinated briefs from entities with identical interests.

Respondents urge this Court to deny AFSA and CBA leave to file their *amici curiae* brief in support of GMAC's Petition for Writ of Certiorari in this case.

August 19, 1992

Respectfully submitted,

JAMES J. GOLD
Counsel of Record
NORMA L. HAMMES
GOLD and HAMMES
Suite 223
1570 The Alameda
San Jose CA 95126
(408) 297-8750
Attorneys for Respondents

TABLE OF CONTENTS

Opposition to Motion for Leave to File Brief as Amicus Curiae in Support of Petitioner i

Additional Relevant Statutory Provisions 1

Arguments in Opposition to Brief of Petitioner's Amici Curiae 1

1. There is no inter-circuit conflict between the Ninth Circuit's decision in this case and the Fourth Circuit's decision in *In re Balbus*, 933 F.2d 246. 1

2. The Bankruptcy Code does not state or imply that a debtor's assets are "enhanced" in value because of a Chapter 13 filing; nor are the debtor's assets enhanced in value, in actual fact. The Ninth Circuit's decision in this case gives no "windfall" to the debtors. 2

3. Section 1325(a)(4) does not require a Chapter 13 debtor to pay *more* on unsecured claims than the holders of those claims would receive in a Chapter 7 liquidation. 3

4. Section 1325(a)(5) does provide for *better* treatment of secured claims than unsecured claims. 4

5. The Ninth Circuit's decision in this case does not render § 1325(a)(5) surplusage in light of § 1325(a)(4). 5

6. Sections 506(a) and 1325(a)(5)(B) were not intended to additionally compensate holders of secured claims for risks they incur under Chapter 13, and such an interpretation of the Bankruptcy Code would conflict with this Court's decision in *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). 6

7. The public policy concerns expressed by AFSA, CBA, and GMAC with regard to the Ninth Circuit's decision in this case are legislative rather than judicial in nature. 7

Conclusion 8

TABLE OF AUTHORITIES

Cases

In re Balbus, 933 F.2d 246 (4th Cir. 1991) 1

United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988) 6,7

Statutes

United States Code, Title 11
- Section 361 6
- Section 362 7
- Section 506 6,7
- Section 725 6
- Section 726 6
- Section 1325 1,3,4,5,6,7

ADDITIONAL RELEVANT STATUTORY PROVISIONS

United States Code, Title 11

Section 1325. *Confirmation of plan*

(a) Except as provided in subsection (b), the court shall confirm a plan if ——

...

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title [11 U.S.C. §§ 701 et seq.] on such date

ARGUMENTS IN OPPOSITION TO BRIEF OF PETITIONER'S AMICI CURIAE

1. **There is no inter-circuit conflict between the Ninth Circuit's decision in this case and the Fourth Circuit's decision in *In re Balbus*, 933 F.2d 246.**

This subject was addressed in Respondents' Brief in Opposition to GMAC's Petition for Writ, and will not be repeated here.

2. **The Bankruptcy Code does not state or imply that a debtor's assets are "enhanced" in value because of a Chapter 13 filing; nor are the debtor's assets enhanced in value, in actual fact. The Ninth Circuit's decision in this case gives no "windfall" to the debtors.**

AFSA and CBA romanticize the benefits received by Chapter 13 debtors in order to promote a public policy argument intended to convince this Court to diminish the benefits Congress did provide.

For example, AFSA and CBA assert that a debtor's assets magically increase in value upon filing a Chapter 13 case. (Amici Curiae Brief, p. 10-11). Nothing could be further from the truth. A car owned by a Chapter 13 debtor is not worth more either to the creditor or to the debtor the moment after a Chapter 13 petition is filed. Before the petition is filed, the car is in exactly the same mechanical and esthetic condition it is the next moment following the filing of the petition. AFSA and CBA claim that the debtor's ability to retain the car in a Chapter 13 in exchange for payment through the plan somehow enhances the value of the car. This just is not true.

The Ninth Circuit did not give any "windfall" to the Mitchells. The Mitchells did not receive the car free of charge. And, the car was not worth more because they filed a Chapter 13.

Chapter 13 debtors pay a stiff price for the protection they receive. They commit all their disposable income to funding the plan for a minimum of three years and often longer. Additionally, Chapter 13 debtors' sale and use of estate property is subject to bankruptcy court control during the pendency of the plan.

Also contrary to AFSA and CBA's claim, Chapter 13 debtors do *not* "avoid the stigma of bankruptcy and any resulting blot on their credit standing." *Ibid*. Creditors are fully

aware that "Chapter 13" is a specific chapter of the *Bankruptcy Code*, and this fact is duly noted on the credit records of Chapter 13 debtors.

AFSA and CBA portray Chapter 13 debtors as affluent and easily capable of paying more to creditors than required by the Bankruptcy Code. They mention that Mr. Mitchell ran "an apparently successful glass installation business." (Amici Curiae Brief, p. 18). In fact, Mr. Mitchell's business filed Chapter 11 and was subsequently liquidated under Chapter 7. Since filing the Chapter 13, the Mitchells have been divorced. The picture has not been quite as rosy as AFSA and CBA imagined.

3. Section 1325(a)(4) does not require a Chapter 13 debtor to pay *more* on unsecured claims than the holders of those claims would receive in a Chapter 7 liquidation.

In order to be confirmed by the Bankruptcy Court, a Chapter 13 plan must provide payment on unsecured claims in an amount "not less than ... would be paid on such claim if the estate of the debtor were liquidated under chapter 7."

The term "not less than" means "equal to or less than." "Equal to or less than" does not mean "more than." Therefore, § 1325(a)(4) establishes a minimum dividend on unsecured claims, but does not require Chapter 13 plans to exceed that minimum payment on unsecured claims.

In fact, most Chapter 13 plans do provide for payment on unsecured claim which *exceed* this minimum dividend. In many Chapter 13 cases, the debtors have no non-exempt (unprotected) unencumbered assets. Therefore, under the § 1325(a)(4) test, such a Chapter 13 plan may be confirmed with no dividend provided for unsecured claims.

General practice in Chapter 13 cases, however, almost invariably provides for some dividend on these claims. So,

although usually Chapter 13 plans do pay more on unsecured claims than would be received in Chapter 7 cases, it is not true that such treatment is mandated by the Bankruptcy Code.

The Mitchells' case is a good example of this typical situation. The Mitchells' Chapter 13 plan provided a 10% dividend to unsecured creditors, although in a Chapter 7 liquidation unsecured creditors would have received nothing.

AFSA and CBA assert that the supposed requirement to pay more on unsecured claims is an indication of Congressional intent to penalize debtors for availing themselves of the protections provided by Chapter 13. There is no authority whatsoever for this position. The statute and legislative history show that Chapter 13 is *favored* over Chapter 7, and Chapter 13 debtors are to be encouraged rather than discouraged from electing its protection.

4. Section 1325(a)(5) does provide for *better* treatment of secured claims than unsecured claims.

AFSA and CBA claim that § 1325(a)(5) provides that "holders of secured claims must receive even better treatment under Chapter 13 plans." (Amici Curiae Brief, p. 11). What AFSA and CBA mean by this assertion is not clear.

Certainly, secured claims are treated better than unsecured claims in Chapter 13 cases. The holder of a secured claim has an enforceable lien in property owned by the debtor. The Bankruptcy Code does not deprive the lienholder of that lien by virtue of the Chapter 13 filing. The Bankruptcy Code requires that the debtor compensate the creditor for that lien by paying the amount which the creditor would have received had it repossessed and disposed of the item on the petition date.

To treat the holder of a secured claim the same as the holder of an unsecured claim would unfairly deprive the

creditor of its property interest and the Bankruptcy Code does not do that.

AFSA and CBA, however, go beyond any provisions in the Bankruptcy Code when they argue that holders of secured claims are rewarded further by increased valuations if the debtor retains the security in the plan. The "value enhancement" referred to by AFSA and CBA (Amici Curiae Brief, p. 11) is completely imaginary and no reading of the Bankruptcy Code justifies this position.

5. **The Ninth Circuit's decision in this case does not render § 1325(a)(5) surplusage in light of § 1325(a)(4).**

AFSA and CBA state:

> Had Congress meant for secured creditors to be guaranteed only this minimal value in Chapter 13 plans, it would not have treated them separately under section 1325(a)(5), but would have simply combined both secured and unsecured claims under section 1325(a)(4), which guarantees payment of an amount not less than would be paid on the claim under a straight liquidation. (Amici Curiae Brief, p. 12, fn. 2)

AFSA and CBA err in this statement because they do not realize that a Chapter 7 trustee normally does not *pay* anything on secured claims.

In writing § 1325(a)(4) and (5), Congress recognized that in Chapter 7 cases, distributions from the estate are "paid" on unsecured claims by the trustee, but are *not* "paid" on secured claims, except in the unusual situation involving the trustee's voiding of a tax lien for the benefit of higher priority unsecured claims.

In a Chapter 7 case, the secured creditor retains its (otherwise unavoidable) lien on the property. If there is no un-exempted equity in the property, the debtor must elect to

surrender it, redeem it, or reaffirm the debt by negotiation with the creditor. In this case no *property of the estate* is distributed to the secured creditor, or *paid on such claim*.

If there *is* un-exempted equity in the property, then that equity becomes property of the bankruptcy estate. The trustee liquidates the estate's interest in the property. The trustee may come to a resolution with the secured creditor and propose a disposition of the bankruptcy estate's interest in the secured property, under 11 U.S.C. § 725. Alternatively, the trustee may obtain a court order authorizing the collateral to be sold, with the lien attaching to the proceeds of the sale. In any case, no *property of the estate* is distributed to the secured creditor, or *paid on such claim*. Note that property of the estate is distributed under a different section, 11 U.S.C. § 726.

These differences clearly show that the framers of the Bankruptcy Code visualized a coherent model of how secured and unsecured claims were to be treated in both Chapter 7 and Chapter 13 cases. Likewise, the Ninth Circuit decision in this case does *not* render § 1325(a)(5) surplusage in light of § 1325(a)(4).

6. **Sections 506(a) and 1325(a)(5)(B) were not intended to additionally compensate holders of secured claims for risks they incur under Chapter 13, and such an interpretation of the Bankruptcy Code would conflict with this Court's decision in *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).**

AFSA and CBA confuse the concept of adequate protection of a security interest under 11 U.S.C. § 361 with the valuation of the secured claim. In a reorganization plan, a creditor's security interest must be protected against depreciation and catastrophic loss, or the creditor may obtain relief from the restraining stay imposed by 11 U.S.C. § 362.

This adequate protection is separate from and does *not* increase the value of the secured claim. Similarly, compensation for deferred payments, commonly referred to as interest, is required under § 1325(a)(5)(B)(ii). This "interest" is separate from and does not increase the value of the secured claim.

The view of AFSA and CBA is contradicted by this Court's decision in *United Savings Ass'n v. Timbers of Inwood Forest Associates*, which found no authority in § 506(a) for *additionally* compensating the holder of a secured claim for being prevented from foreclosing on its security interest.

7. **The public policy concerns expressed by AFSA, CBA, and GMAC with regard to the Ninth Circuit's decision in this case are legislative rather than judicial in nature.**

It is true that the discharge of unsecured debt detrimentally affects other borrowers and the shareholders of lenders. This effect is diffused throughout the members of these classes. Congress recognized that this would occur, and in its deliberations reviewed economic studies of the projected effects of the discharge of debts. Congress adopted what it believed to be a fair result by balancing the interests of debtors against the interests of those who would be detrimentally affected.

The societal concerns of AFSA, CBA, and GMAC are public policy issues. If creditors believe there is any unfair treatment of the general public by the Bankruptcy Code, they may seek legislative redress. It is inappropriate for them to ask this Court to step into Congress's legislative role in that regard.

CONCLUSION

For these reasons, the Court should deny AFSA and CBA's motion for leave to file brief and deny GMAC's petition for a writ of certiorari.

Dated: August 19, 1992

Respectfully submitted,

JAMES J. GOLD
Counsel of Record
NORMA L. HAMMES
GOLD and HAMMES
Suite 223
1570 The Alameda
San Jose CA 95126
(408) 297-8750
Attorneys for Respondents